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NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ELLIS S. RUBIN,

Petitioner,

v.

STATE OF FLORIDA,
and
FRED CRAWFORD,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF FLORIDA

THE PETITION FOR WRIT OF CERTIORARI AND AN APPENDIX

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48 pp

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

QUESTIONS PRESENTED FOR REVIEW
Introduction

The main issues here are: What should the lawyer do when his criminal client intends to testify falsely in State Court? And, when ethics and a Court Order collide, must a lawyer be jailed for choosing ethics?

1. After an attorney has advised the court during an attempted withdrawal that his client/defendant intends to testify falsely, may the attorney be found in direct criminal contempt for refusing a direct order of the State trial court to present his client/defendant to the jury to narrate known false testimony?

2. Does such an order by a State trial judge allow the attorney to: (a) represent his client within the bounds of the law; (b) facilitate the court's search for the truth; (c) preserve and promote the efficient opera tion of our system of justice; (d) obey ethi cal standards of not participating in a dishonest trial or jury deception or fraud on the court; (e) avoid possible future criminal prosecution for conspiracy and aiding and abetting perjury; (f) avoid a stigma of antisocial conduct if convicted of contempt; (g) avoid possible future disciplinary action by the Bar Association for participating in and presenting false evidence; (h) make a rational and reasonable choice between 35 years of

obeying his Oath, the Code of Ethics, case law, and criminal statutes OR obeying a unique and unauthorized, untested Order of the trial judge?

3. Does such refusal by the attorney after attempted withdrawal and disclosure of probable client perjury demonstrate proof beyond a reasonable doubt of guilt of: (a) reckless disregard for his professional duties; (b) conduct exceeding reasonable limits; (c) mali cious, willful, contumacious misbehavior intended to actually obstruct the court in its performance of judicial duties; (d) and hinderence of the system's rational search for the truth OR did such conduct interpose a good faith refusal to violate 35 years of adherence to the attorney's Oath, old

Codes of Ethics and the current Code of Professional Responsibility, Supreme Court of Florida case law and criminal perjury statutes?

4. If the Third District Court of Appeal of Florida and the Supreme Court of Florida were advised of the Supreme Court of the United States decision of Nix v. Whiteside, 106 S.Ct. 988 (1986), before those Florida Courts decided the appeal of Petitioner's direct criminal contempt conviction and the Petitioner's Writ of Habeas Corpus, was their absolute ignoring or overlooking of Nix (which answered all of the questions presented in the Petition at Bar favorably to the Petitioner), fundamentally fair OR did such denial of the existence of Nix by the Florida Courts

deprive Petitioner of that substantive due process required by the 14th Amendment of the United States Constitution.

5. By not adhering to the holdings and precedents set by the United States Supreme Court in Nix (supra), and in Maness v. Meyers, 95 S.Ct. 584 (1975) (permitting attorneys to take appropriate good faith steps to test questionable orders by precompliance disobedience), and in Shillitani v. United States, 86 S.Ct. 1531 (1966) (affording attorneys who do not have the ability to comply with court orders in any meaningful sense a defense to criminal contempt), have the Florida Courts deprived Petitioner of fundamental fairness and substantive due process as

found in the 14th Amendment to the Constitution of the United States?

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GROUNDS FOR SUPREME COURT JUSRISDICTION

The Orders of the Supreme Court of Florida sought to be reviewed, are: the Order declining to accept jurisdiction, thus denying the Petition for Review (Writ of Certiorari to the Third District Court of Appeals of Florida) in Case #69,048 and the Order denying the Petition for Writ of Habeas Corpus in Case #69,025 are both dated December 19, 1986.

Pursuant to Supreme Court Rule 19.4, this single Petitioner covering both cases is being filed.

The Order of the Supreme Court of Florida denying Petitioner's Motion For Rehearing on that denial of the Petition for Writ of Habeas Corpus in Case #69,025 is dated January 16, 1987.

The statutory provision conferring jurisdiction on the Supreme Court of the United States is found in 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES INVOLVED

The principal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the full text of which is printed in the Appendix hereto (A-141).

The regulations involved are: The Florida Oath Of Attorneys, The Integration Rule Of The Florida Bar, and The Florida Code Of Professional Responsibility, excerpts of which are printed in the Appendix hereto (A-97 to 140).

The Statutes involved are Sections 837.02(1), 777.011 and 777.04(3) Florida Statutes, set forth in the Appendix hereto (A-143 to 146).

STATEMENT OF THE FACTS AND THE CASE

Petitioner was convicted, adjudged guilty of direct criminal contempt, and sentenced to thirty (30) days in jail by the Circuit Court In And For Dade County, Florida in September, 1985 for willfully refusing to obey a direct order to proceed to trial by jury forthwith as defense counsel for a first degree murder Defendant (A-9).

Just prior to the trial, first degree murder defendant/client Sanborn threatens, then promises to testify falsely on his own behalf during trial; he demands that the atttorney/Petitioner aid, assist, and cover up the perjury. The attorney refuses.

The attorney attempts to dissuade the

client from such activity; the client refuses to abide by the attorney's advice; then the client agrees to the attorney's intended withdrawal in Open Court on the day of trial. The attorney files a written mandatory and permissive Motion To Withdraw and argues same to the Trial Judge at the trial call, alleging certain obligations in the attorney's Code of Professional Responsibility the Attorney's Oath and criminal statutes... while invoking attorney-client privilege not to reveal specifics.(A-22).

Assuming intended client-perjury, the Trial Judge denies the attorney's Motion To Withdraw and agrees with the Prosecutor's suggestion by ordering defense counsel to: (a) allow the

client to testify falsely by narrative only; (b) not refer to the defendant's perjurious testimony in closing argument.

The attorney, on ethical grounds, refuses to proceed, but the Trial Judge allows him to file an immediate Petition For Certiorari of the denial of the Motion To Withdraw (A-12).

The Third District Court of Appeal of Florida affirms the denial of the withdrawal in Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985) and suggests that defense attorney proceed to trial using the formula of no direct elicitation of testimony from the client and no reference to the narration in closing arguments. The Opinion notes a

pending case, Nix v. Whiteside, in the United States Supreme Court, by which it is hoped the attorney's duty to deal with intended client perjury will be clarified. (A-15). A Motion For Rehearing is denied (A-27).

The Trial Court then orders the attorney to immediately proceed to trial as suggested by the Appellate Court. The attorney respectfully declines, citing his Oath, The Code Of Professional Responsibility, and certain criminal statutes as reasons (A-35). The attorney is immediately charged by the Trial Judge with direct criminal contempt for refusal to proceed to trial and is convicted, adjudicated guilty and sentenced to thirty (30) days in jail (A-9).

Motion for New Trial is denied (A-45).

While free on his own recognizance, the attorney appeals the contempt to Florida's Third District Court of Appeal.

During the pendency of the appeal, the Petitioner is officially notified by The Florida Bar of Complaint because of the contempt finding. He is being charged with a possible violation of engaging in conduct "that is prejudicial to the adminisitration of justice" and "that adversely reflects on his fitness to practice law." Those charges are still pending (A-49).

After submission of briefs by both sides, the State of Florida provides the Appellate Court with copies of Nix v.

Whiteside, 106 Sup. Ct. (1986) (A-50). One hundred and eleven days later, the Third District Court of Appeal affirms Petitioner's contempt and sentence in Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA 1986). Not one word of Nix (supra) appears therein (A-4); however, the Court acknowledges that its ruling in Sanborn is "the law of the case" in Rubin. Petitioner is jailed upon rehearing being denied.

The attorney petitions the Supreme Court of Florida for its Writ of Habeas Corpus and is temporarily released pending disposition (A-52). Petitioner also appeals to the Florida Supreme Court from the Third District Court of Appeal's affirmance by way of Petition for Review (A-58). The State files a

Response in the habeas proceeding (A-59), and Petitioner files a Second Amended Reply that raised and argued every issue at bar here (A-66). Both the Habeas Corpus and Petition for Review from the Third District Court of Appeal are denied on December 19, 1986 in Rubin v. Crawford, Case #69,025 (A-2) and Rubin v. State, Case #69,048 (A-1). Motion For Rehearing is filed in Habeas Corpus Case #69,025 (A-93) and is denied on January 16, 1987 (A-3). Rehearing was not allowed on the Appeal Case 69,0[illegible].

Petitioner was reincarcerated on February 9, 1987 where he remains at the time of the filing of this Petition For Writ of Certiorari. Upon this filing, Petitioner will seek a stay of execution

of the sentence from the Supreme Court of Florida. If unsuccessful there, a stay will be sought in this Court pending final resolution.

THE STAGES OF THE PROCEEDINGS IN ALL COURTS BELOW AT WHICH FEDERAL QUESTIONS SOUGHT TO BE REVIEWED HERE WERE RAISED, HOW THEY WERE RAISED, AND HOW DISPOSED OF ARE AS FOLLOWS:

1. In its decision requiring Petitioner to remain as Sanborn's attorney by using the formula of letting him testify falsely by narration and not mentioning it in summation, the Third District Court of Appeal of Florida, in Sanborn v. State, supra, specifically refers to the then pending Nix v. Whiteside case ready for decision by the United States Supreme Court at 474 So.2d 309 at 315, note 4. This indicates consideration of the federal questions involved in Nix by the Court in deciding Sanborn. In the same Sanborn decision, reference is made

to United States v. Curtis, 742 Fed. 2d 1070, (7th Cir. 1984) for the proposition that a client cannot compel his attorney to present false evidence, false testimony, nor perpetuate a fraud on the Court. Thus, the Sanborn Court considered the federal ramifications of that case and its findings.

2. Petitioner filed a Motion for Rehearing in Sanborn. Reference is made on Page 5 thereof (A-32) of the pending Nix case as Whiteside v. Scurr, 744 Fed. 2d 1323 (8th Cir. 1984). Petitioner alleged that Sanborn ignores that federal case which held that the Defendant would be denied effective assistance of counsel if withdrawal is denied and defense counsel is ordered not to elicit defendant's testimony nor

refer to it in closing arguments.

The Motion for Rehearing was denied.

The Sanborn Rehearing Motion also cites Strickland v. Washington, 104 S.Ct. 2052 (1984) in arguing that Petitioner could not fulfill his duties as described in the case if the Sanborn formula was executed. The Motion for Rehearing was denied.

3. Petitioner filed a Motion for New Trial from his conviction for contempt (A-45). Paragraph Six thereof alleged deprivation of due process as guaranteed under the Due Process Clause of the 14th Amendment to the United States Constitution by the trial court as a result of the conviction. The Motion for New Trial was argued and then

denied.

4. Petitioner appealed his contempt conviction to the Third District Court of Appeal of Florida. One of the points involved was whether the lawyer's Constitutional rights to procedural due process were violated by the conviction. On Page 32 of his Initial Brief, Petitioner urged:

> "the facts at Bar require reversal because Appellant was denied due process as required by both the Florida and United States Constitution."

In the Brief of the Appellee the State of Florida, the Strickland v. Washington, supra, is cited for the proposition that defendant's perjury could be nullified by mistrial or impeachment by the trial judge "and the reliability of the fact finding process would be preserved".

See Page 13 of that Brief. Petitioner's Reply Brief in the Appeal, on Page 4, used United States v. Havens, 446 U.S. 620 (1980) to emphasize that "truth is a fundamental goal of our legal system." Further on Page 5 we find the truism of Harris v. New York, 401 U.S. 222 (1971) that the United States Constitution does not protect perjured testimony.

Thus, federal law was considered by the Third District Court of Appeal in denying Petitioner's Appeal of the contempt conviction.

5. One hundred and eleven days before the Florida Appellate Court upheld Petitioner's conviction, judgment and sentence for direct criminal contempt in Rubin v. State, 490 So.2d 1001 (Fla. 3d

DCA 1986), the appellee State of Florida filed with that Court the Supplemental Authority the Opinion of the Supreme Court of the United States in Nix v. Whiteside, 106 S.Ct. 988 (1986). That case considers, comments on, and postulates correct attorney conduct in dealing with intended client perjury. Every issue presented here is thoroughly discussed there.

Guidelines distinguishing between ethical conduct and duty to clients are delineated. The Opinion in Rubin v. State, supra, although authored by one of the panel who decided and wrote a Concurring Opinion in Sanborn wherein he looked forward to this Court's decision in Nix to furnish such guidelines, makes no mention of Nix v. Whiteside. It does

cite United States v. Dickinson, 465 Fed. 2d 496 (5th Cir. 1972; Walker v. City of Birmingham, 87 S.Ct. 1824, 1976; and Malley v. Briggs, 106 S.Ct. 1092 (1986).

Thus, it is evident that certain federal issues were studied; some found there way into Rubin v. State and some did not.

6. Petitioner filed an Application for Writ of Habeas Corpus to the Supreme Court of Florida. On Page 5 (A-57) thereof, Paragraph 8 alleges that for a Florida trial Court to require a lawyer disobey the Code of Professional Responsibility, then to find him guilty of contempt for failure to do so, is contrary to and beyond the contemplation

of the Constitution of the United States of America.

The Petition for Habeas has been denied.

The State's response to the Petition for the Writ cites the United States Supreme Court case of Maness v. Meyers, 95 S.Ct. 584 (1975), on Pages 4 and 5 (A-63 to A-64). This case is seminal for a good faith precompliance review by resisting questionable orders. And the State also refers to Walker v. City of Birmingham, supra, on Page 5 of its Response to the Supreme Court of Florida.

Petitioner then filed a Second Amended Reply.

Each and every issue presented by this Petition for Writ of Certiorari to this

Court was thoroughly discussed and argued in that pleading, including Nix, Maness, Harris, and Strickland all of which were rejected by the Supreme Court of Florida when they denied Petitioner's Application for Writ of Habeas Corpus (A-66).

7. Petitioner's last pleading below is the Motion for Rehearing from the Supreme Court of Florida's denial of his Petition for Writ of Habeas Corpus (A-93).

Again, Maness, Nix, and Shillitani were discussed from the view that by ignoring them, Florida was depriving Petitioner of fundamental fairness and substantive due process guaranteed to all by the 14th Amendment to the U.S. Constitution. Rehearing was denied. (A-3).

REASONS RELIED ON FOR THE WRIT

> "In some future case challenging attorney conduct in the course of a state court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the State in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct." -- Mr. Chief Justice Burger, Nix v. Whiteside, supra, at 994, (1986).

This is that future case, and the Petitioner-attorney, because he performed exactly as prescribed in Nix, is believed to be the first American lawyer to be jailed for refusal to aid and abet intended client-perjury during a state criminal trial. It is thus obvious that "there are special and important reasons" for this court to review RUBIN V. STATE, 490 So.2d 1001 (Fla. App. 3 Dist. 1986), cert. denied by Supreme

Court of Florida Case, #69,048; and Petition for Writ of Habeas Corpus denied by Supreme Court of Florida, Case #69,025 (December, 1986); rehearing denied, January, 1987.

The Supreme Court of Florida, in denying Certiorari and Habeas Corpus, has approved the decision of the Third District Court of Appeal of Florida which decided an important question of federal law which has not been, but should be, settled by this Court, AND has decided a federal question in a way in conflict with applicable decisions of this Court:

Is it fundamentally fair and substantive due process for a State Court Judge to issue an Order to an attorney to allow

perjury and jury deception, the compliance of which would require him to violate his Oath of 35 years standing, the Florida Code of Professional Responsibility, prior Florida Supreme Court case law, and Florida criminal statutes; while the disobedience of which would bring him loss of liberty (30 days in jail), loss of property (public humiliation, loss of reputation), loss of income for the time in jail and afterwards, and disciplinary action by The Florida Bar that could lead to further property loss?

By punishing a lawyer for choosing ethics over a court order, Florida has placed restrictions on ethical standards and obligations that infringe on every lawyers' federal constitutional rights

to liberty and property. But, equally important is this:

For 35 years, Petitioner followed a certain course of conduct in his professional and personal life as an attorney. In court, he strove to always assist the legal system in making a jury trial a search for the truth. This was done by strict adherence to legal ethics. Suddenly, in 1985, he is faced with an almost impossible choice: either violate everything he has lived by and stood for as a free man and as a lawyer OR go to jail as a common criminal!

Is such a choice valid -- or is it unreasonable, irrational and unnecessary (in light of Nix, the Code of

Professional Responsibility and common sense)? The consequences of choosing ethics -- thus incarceration -- are widespread and dangerous. The public perception of a criminal justice system that jails a lawyer who reported intended perjury to a judge is disasterous. How can American law --American justice -- attempt to force a lawyer to be dishonest by jailing him? As it stands now, the entire Bench and Bar of Florida are under court order that they act legally and ethically when they knowingly allow a client to perpetrate fraud and perjury upon a jury while the lawyer can stand by and pretend it isn't happening. And if he refuses, the lawyers can be sent to jail!

The proper administration of justice is certainly under scrutiny here.

Petitioner knows of no other case where an American lawyer has been jailed for refusing to be a party to court-approved client perjury and deliberate jury deception. What could be of greater public importance?

While lawyers must never commit or assist in the commission of crimes, neither should they be jailed for trying to prevent one. They must use all honorable means to see that justice is done, rather than going to any lengths to see that the defendant is acquitted. An attorney must weigh his obligations to his client against his obligations to the profession and to society. It is often difficult to determine where the

rights of clients end and those of society begin. Can dilution of the rule of law be far behind when lawyers are required to protect instead of expose perjury?

How far can a lawyer go in defending a client accused of crime? Should his highest loyalty be to the client or to society? When an appellate court orders a lawyer to let a criminal defendant commit perjury and falsify testimony while defense counsel pretends to the jury that he doesn't know it, is the lawyer's silence participation? Is this fair to the jury -- and to the lawyer? Can such procedure fulfill the quest of all trials --WE WHO LABOR HER SEEK ONLY TRUTH?

Lawyers must be trusted to make moral and ethical decisions. It is both immoral and unethical to aid, participate in, acquiese to or suborn perjury - either actively or passively. The Code of Professional Responsibility does not require a lawyer to orchestrate a client's perjury and then argue to the jury that it should find true what the lawyer knows to be false; neither does the Code require defense counsel to be partners with a perjurious client in a dishonest and deceitful scheme. The Code commands just the opposite. Rubin requires exactly what the Code prohibits.

If Rubin is correct, where does it stop? Can a client now force his attorney to introduce forged documents, just as in

Rubin the client can force his attorney to allow introduction of perjured testimony? Surely it is better for justice and the goal of the legal system (to seek the truth) for the rule to remain that an attorney cannot knowingly use or allow to be used perjured testimony or otherwise participate in the creation or presentation of evidence the attorney knows to be false.

For a lawyer to participate in a dishonest trial is subversion of our judicial system. Past holdings of Florida courts and the 1983 ABA Model Rules condemn Florida's new formula for protecting client perjury. Lawyers must be dedicated to "finding the truth" instead of passively endorsing perjury by looking the other way. Silence here is par-

ticipation in a dishonest trial.

The Trial Court's Order to proceed to trial while using client perjury placed Petitioner in the untenable position of refusing a court order because he believed it violated the Code of Professional Responsibility. A lawyer should not be adjudged guilty of direct criminal contempt and placed in jail for thirty (30) days because he chose the Code and his personal integrity.

If a lawyer advises the Court that he does not wish to be a partner in what he considers dishonesty, deception, fraud and perjury --that he does not want to participate, even silently, in conduct he knows or thinks violates ethical standards and the criminal law, the

Court should honor the request to withdraw instead of placing the attorney in jail. In upholding those standards which guide us, this attorney has run afoul of a suggested procedure promulgated by Florida Courts. By choosing provisions of the Code to govern his conduct, he finds himself condemned as a criminal sentenced to serve time in jail.

The ultimate answers could determine not only the way our society views lawyers, but how they feel about our entire judicial system. The battle against crime is, after all, eventually fought in the courtroom.

If this contempt is upheld, it is now the law that a lawyer can legally,

ethically, morally and effectively use false testimony in a jury trial with Court approval if he looks the other way and pretends it is not happening. Appellant cannot believe that this Court would change our system of justice from seeking the truth to a lying contest.

Those are a few of the reasons why the Supreme Court of the United States should speak through this case. It is a great public importance that the standards and procedures mandated by Rubin be compared to those suggested by Nix. Is it better for justice to let jurors know that lawyers are no longer under any obligation to prevent perjury? And if the public comes to learn or even believe, through Rubin, that lawyers help other people to lie, why should

anybody believe them when they address juries?

CONCLUSION

A most dangerous precedent has been established by Florida in upholding Rubin. That opinion severely damages the reputation of the legal profession and our entire system of justice. It is for this Court to replace court-approved perjury and jury deceit with truth and justice. It is time to say: Nix on Rubin. For the foregoing reasons the Petition for Writ of Certiorari should therefore be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petition for Writ of Certiorari and an Appendix was mailed this 16th day of February, 1987 to: Julie S. Thornton, Assistant State Attorney General Department of Legal Affairs, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida; this 16th, day of February, 1987.

Respectfully submitted,

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